Supreme Court, U.S.
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NO.

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IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

WILLIAM CHARLES PAYTON, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Boyde v. California*, 494 U.S. 370 (1989), this Court upheld the constitutionality of California's "catch-all" mitigation instruction in capital cases, which directs a jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

1. Did the Ninth Circuit correctly conclude that this Court's holding in *Boyde* is limited to "pre-crime evidence" in mitigation, and that the instruction is "unconstitutional as applied to post-crime evidence" in mitigation?

2. Does the Ninth Circuit's holding that California's "catch-all" mitigation instruction is constitutionally inadequate as applied to post-crime evidence in mitigation, and that Payton's jury must be affirmatively instructed "that it must take his post-crime evidence into account," constitute a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989)?

3. Did the Ninth Circuit correctly determine that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (28 U.S.C. § 2241, *et seq.*) does not apply to petitions filed after AEDPA's effective date of April 24, 1996, if a motion for appointment of counsel and stay were filed before the effective date, a holding which is in conflict with other circuits and is the subject of this Court's grant of certiorari in *Woodford v. Garceau*, __ U.S. __, 123 S. Ct. 32 (Oct. 1, 2002) (No. 01-1862)?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

JEANNE WOODFORD, Warden, *Petitioner,*

v.

WILLIAM CHARLES PAYTON, *Respondent.*

Jeanne Woodford, Warden, California State Prison at San Quentin [hereinafter the State], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (en banc) is reported at *Payton v. Woodford*, 299 F.3d 815 (9th Cir. 2002) and contained in Appendix A. The Ninth Circuit order denying rehearing en banc or by the full court is unreported and contained in Appendix B. The opinion of the Ninth Circuit (panel) is reported at *Payton v. Woodford*, 258 F.3d 905 (9th Cir. 2001) and contained in Appendix C. The order of the District Court is unreported and contained in Appendix D.

The opinion of the Supreme Court of California is reported at *People v. Payton*, 3 Cal. 4th 1050, 839 P.2d 1035, 13 Cal. Rptr. 2d 526 (1993), and is contained in Appendix E.

STATEMENT OF JURISDICTION

On August 1, 2002, the en banc Ninth Circuit filed its order and opinion granting habeas relief. On September 30, 2002, the Ninth Circuit denied the State's petition for rehearing en banc or alternatively, for hearing by the full court. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Eighth Amendment of the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

California Penal Code section 190.3 (Appendix F), which provides in pertinent part:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
> . . . (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

The Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA") and that provision of Chapter 154, 110 Stat. 1226, Public Law 104-132, section 107(c), which provides:

> (c) EFFECTIVE DATE. -- Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act.

STATEMENT OF THE CASE

In the early hours of May 26, 1980, Respondent William Charles Payton went to the home of Patricia Pensinger in Garden Grove, California, where he had once been a boarder. After receiving permission from Patricia to sleep on her couch, Payton later entered Patricia's bedroom while she and her ten year old son, Blaine, slept. Payton inflicted 40 stabs wounds to Patricia's face, neck, back and chest. He inflicted 23 stabs wounds to Blaine's face, neck and back. Both survived.

Patricia's boarder, Pamela Montgomery, who had also been attacked by Payton, did not survive. She was found stabbed to death in her bedroom. Semen that could have come from Payton was found in Pamela's vaginal area.

On March 9, 1982, a jury found Payton guilty of one count of first-degree murder (Cal. Penal Code § 187) and rape (Cal. Penal Code § 261 (2)) and two counts of attempted murder (Cal. Penal Code §§ 664, 187). The jury also found true the special circumstance of murder while Payton was in the commission or attempted commission of rape (Cal. Penal Code § 190.2(a)(17)(iii)). The jury also found true the allegations Payton personally used a knife in committing the murder and attempted murders (Cal. Penal Code § 12022(b)).

At the penalty phase, the prosecutor introduced evidence of a prior incident in which Payton stabbed an old girlfriend in the chest and arms after waking her, and Payton's jail house conversations in which he said he had "a severe problem with sex and women" and "that all women on the street that he had seen [sic] was a potential victim, regardless of age or looks." (RT 1928-31, 1936-37.) In mitigation, Payton's defense presented eight witnesses who testified he had made a sincere commitment to God while in prison, had a calming effect on other prisoners, and could help others while in prison through

Bible study classes and a prison ministry. (RT 1944-63, 1970-71, 1980-85, 1998-2000, 2006-10, 2012, 2015, 2018.)

During closing argument, the prosecutor and Payton's defense counsel discussed California's "catch-all" mitigation evidence instruction (factor (k)), which advised the jury to consider "any other circumstances which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The prosecutor argued that the instruction "doesn't refer to anything after the fact or later" and that the facts of the case and Payton's other acts of violence "line up against really nothing except [Payton's] new born Christianity . . . ." (RT 2122, 2132.) Defense counsel unsuccessfully moved for a mistrial. The judge admonished the jury:

> Again, I want to emphasize to you that comments by both prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument. And it's to be placed in its proper perspective.

(RT 2124.)

Defense counsel argued to the jury that the factor (k) instruction was a catch-all instruction designed to include the kind of evidence that Payton presented. (RT 2149-50.) The trial court's final instructions to the jury included the following:

> In determining the penalty to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of trial in this case, except as you may be hereinafter instructed. You shall consider, take into account and be guided by the following factors, if applicable: . . . [¶] (k),

> Any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime.

(RT 2158-60.)

The jury returned a verdict of death. The trial court denied Payton's motion to modify the verdict and sentenced Payton to death for the murder of Pamela Montgomery and to 21 years and eight months in State prison for the rape of Pamela Montgomery and the attempted murders of Patricia and Blaine Pensinger.

The Supreme Court of California affirmed Payton's convictions and sentence of death and denied his habeas petition. *People v. Payton*, 3 Cal. 4th 1050, 1079, 839 P.2d 1035, 13 Cal. Rptr. 2d 526 (1993); App. E at 220. Certiorari was denied. *Payton v. California*, 510 U.S. 1040 (1994).

On July 18, 1994, Payton filed requests for appointment of federal habeas counsel and for a stay of his execution. Payton filed his federal petition for habeas corpus on May 3, 1996, after the April 24, 1996, effective date of the AEDPA. The United States District Court for the Central District of California (Real, J.) denied the habeas petition as to the guilt phase and granted the habeas petition as to the penalty phase, ordering either a new penalty trial or a reduction of the sentence to life without the possibility of parole. App. D at 157. The State appealed from the grant of the habeas petition as to the penalty phase, and Payton cross-appealed from the denial of the habeas petition as to the guilt phase.

The Ninth Circuit panel affirmed the denial of the habeas petition as to the guilt phase and reversed the grant of the habeas petition as to the penalty phase. *Payton v. Woodford*, 258 F.3d 905, 916-17; App. C at 127.

On August 1, 2002, an en banc panel of the Ninth Circuit reversed the three judge panel's decision as to the penalty phase in a six to five opinion. *Payton v. Woodford*, 299 F.3d 815, 830; App. A at 46-47. The State's petition for rehearing by the en banc panel, or, alternatively, by the full court was denied on September 30, 2002. App. B at 73.

REASONS FOR GRANTING THE WRIT

A. Introduction

In *Boyde v. California*, 494 U.S. 370 (1989), this Court upheld the constitutionality of the same "catch-all" factor (k) mitigation instruction used in Payton's trial. This Court found the instruction, standing alone, comported with the Eighth Amendment requirement a capital jury consider all mitigation evidence offered by the defendant in determining the appropriate sentence. This Court expressly rejected the contention the "catch-all" mitigation instruction precluded consideration of "non-crime" related mitigation evidence. *Boyde*, 494 U.S. at 380-81.

The Ninth Circuit in *Payton* circumvented *Boyde*'s holding by limiting it to cases involving only the presentation of pre-crime evidence in mitigation. The Ninth Circuit held: "Standing alone, the factor (k) instruction is unconstitutional as applied to post-crime evidence" and that "Payton is entitled to a penalty trial before a jury that is properly instructed that it must take his post-crime mitigation evidence into account in determining whether to impose a sentence of life or death." *Payton v. Woodford*, 299 F.3d at 824, 830; App. at 29, 46.

Not only did the Ninth Circuit misread *Boyde* but its holding constitutes a "new rule" under *Teague*, which the Ninth Circuit ignored although it was raised by the State. The limitation on *Boyde* and the imposition of an affirmative duty to

instruct on post-crime mitigation evidence has the potential to undermine the validity of numerous California death sentences as well the sentencing schemes in other jurisdictions which do not specifically call for pinpoint consideration of post-crime mitigation evidence or other specific categories of mitigation evidence.

The Ninth Circuit also circumvented *Boyde* and California's reasonable application of that decision by holding the AEDPA did not apply to Payton's post-AEDPA petition because he had filed requests for appointment of counsel and stay of execution prior to the operative date of the AEDPA. The Ninth Circuit's holding is in conflict with other circuits and is the subject of this Court's grant of certiorari in *Woodford v. Garceau*, __ U.S. __, 123 S. Ct. 32 (No. 01-1862).

Certiorari should be granted for all three reasons.

B. The Ninth Circuit's Holding In *Payton* Directly Contravenes This Court's Holding In *Boyde*

In *Boyde v. California*, 494 U.S. 370, this Court upheld the constitutionality of California's "catch-all" mitigation instruction in capital cases, the same instruction given in Payton's case, against an Eighth Amendment challenge. The instruction, based on California Penal Code section 190.3 (k), directs a jury in a capital case to consider: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Boyde*, 494 U.S. at 372; California Jury Instructions, Criminal [CALJIC] No. 8.84.1 (4th Ed 1979)[1]; App. F; RT 2160.

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1. The trial court in *Boyde* also provided the jury with a definition of "extenuates," namely "to lessen the seriousness of the crime as by giving an excuse." *Boyde*, 494 U.S. at 381.

Under the Eighth Amendment, a jury determining whether to impose death must be permitted to "consider and give effect to all relevant mitigation evidence" offered by the defendant. *Boyde*, 494 U.S. at 377-78, citing *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). Boyde argued "that the 'catch-all' factor (k) [instruction] did not allow the jury to consider and give effect to *non-crime related mitigating evidence*, because its language . . . limited the jury to other evidence that was *related to the crime*." *Boyde*, 494 U.S. at 378; emphasis in original and added.

This Court rejected Boyde's contention. Considering the instruction "standing alone" this Court held there was not "a reasonable likelihood that the jury applied the instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380-81. This Court explained that "the jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes consideration of a defendant's background and character." *Id.* at 382; emphasis in original. Thus, this Court found California's "catch-all" mitigation instruction was constitutional, on its face, because it permitted consideration of non-crime related evidence in mitigation in determining whether to impose the death penalty. *Id.* at 380-82.

Additionally, this Court held that even were the language of the "catch-all" instruction "less clear than we think," there was no "reasonable likelihood" that the jury would have believed it could not consider Boyde's mitigation evidence. *Boyde*, 494 U.S. at 383. This Court examined other instructions, also given to Payton's jury, which directed the jury to consider mitigation evidence not associated with the crime itself, such as

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The definition, however, was not the basis for the decision.

lack of prior criminal activity or felonies, the age of the defendant and the instruction that the jury "shall consider all of the evidence which it has received during any part of the trial in this case." This Court concluded: "When factor (k) is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all *non-crime related* evidence in mitigation." *Boyde*, 494 U.S. at 383 (emphasis added); RT 2158-60.

Further, because the entirety of Boyde's evidence at the penalty phase related to his background and character and was introduced without objection, this Court found it "unlikely that reasonable jurors would believe the court's instruction transformed all of this 'favorable testimony into a virtual charade.'[citation omitted]." *Boyde*, 494 U.S. at 383-84.

Lastly, this Court examined the argument of counsel, observing they generally carry "less weight" with a jury than do instructions from the court. "The former are usually billed in advance to the jury as matters of argument, not evidence, ...and are likely viewed as statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of law." *Boyde*, 494 U.S. at 384. This Court found nothing objectionable about the prosecutor's argument that the mitigation evidence did not "suggest that petitioner's crime is less serious or that the gravity of the crime is any less," and that "nothing I have heard lessens the seriousness of this crime." *Id.* at 384. Defense counsel also properly stressed a broad reading of the "catch-all" mitigation instruction. *Id.* at 386. Accordingly, this Court held that there was no reasonable likelihood that Boyde's jury interpreted California's "catch-all" mitigation instruction to preclude consideration of Boyde's non-crime related mitigation evidence. *Ibid.*

In *Payton*, the en banc Ninth Circuit held that *Boyde's* holding is limited to pre-crime evidence in mitigation, stating: "The United States Supreme Court held that the factor (k) instruction was not ambiguous as applied to pre-crime background and character evidence as long as the trial court provided clarification of its meaning." *Payton v. Woodford*, 299 F.3d at 824 (emphasis added); App. A at 28. The majority reasoned:

> *Boyde* did not address the question whether, on its face, the unadorned factor (k) instruction is unconstitutionally ambiguous as applied to post-crime evidence. The fact that all of Payton's mitigating evidence was post-crime distinguishes this case from the pre-crime evidence at issue in *Boyde* which more readily fits within factor (k).

Payton, 299 F.3d at 824 [internal quotes and citation omitted]; App. A at 28.

The majority concluded:

> Unlike the pre-crime evidence in *Boyde*, post-crime mitigation evidence is simply not covered by any natural reading of the words of the unadorned factor (k) instruction. Mitigation evidence occurring after the crime cannot possibly "extenuate the gravity of the crime."

Payton, 299 F.3d at 824 (emphasis added); App. A at 29.

According to the majority:

> Most naturally read, the phrase extenuates the gravity of the crime refers to evidence relating to or ameliorating the crime itself. On its face, factor (k) does not encompass the kind of post-crime evidence

> of good works, leadership and religious beliefs that Payton presented at the penalty phase of his trial.

Payton, 299 F.3d at 823 (emphasis added); App. A at 26.

Therefore, the majority found:

> Because the unadorned factor (k) instruction does not encompass post-crime evidence, it violates *Skipper's* [*Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)] requirement that the jury be permitted to consider post-crime good behavior as mitigating evidence in deciding whether to impose the death penalty. See 476 U.S. at 5, 106 S.Ct. 1169.

Payton, 299 F.3d at 824; App. A at 29. Accordingly, the majority held: "Standing alone, the factor (k) instruction is unconstitutional as applied to post-crime evidence." *Payton*, 299 F.3d at 824; App. A at 29.

Based on the finding of unconstitutionality of California's "catch-all" mitigation instruction as applied to post-crime evidence, the Ninth Circuit then imposed an affirmative duty on the State trial courts to instruct the jury to take such evidence into account. Specifically, the Ninth Circuit held: "Payton is entitled to a penalty trial before a jury that is properly instructed that it must take his post-crime mitigation evidence into account in determining whether to impose a sentence of life or death." *Payton*, 299 F.3d at 830 (emphasis added); App. A at 46.

In holding that *Boyde* is limited to pre-crime evidence in mitigation, the Ninth Circuit adopts the very argument this Court rejected in *Boyde*, namely that California's "catch-all" mitigation instruction limits the jury's consideration of mitigation evidence to circumstances *related to the crime*. The Ninth Circuit majority side stepped the direct conflict with *Boyde* by relying on *factual* differences that do not address the

reasoning and holding of *Boyde*, which applies equally to pre and post-crime evidence in mitigation. The Ninth Circuit majority opinion provides no valid basis for limiting *Boyde* to pre-crime evidence.

> As the dissenting judges observed in *Payton*:
> Just because Boyde's "disadvantaged background and his character strengths in the face of those difficulties,". . . was the evidence in question in that case does not mean post-crime evidence should be viewed differently. Once one acknowledges, as the Supreme Court did in *Boyde*, that factor (k)'s text allows for consideration of evidence beyond the crime itself, there is no logical reason to believe that post-crime character strengths are any less capable of extenuating the gravity of the crime than pre-crime character strengths or are any more excluded from a reading of factor (k).

Payton, 299 F.3d at 833 (dissent) (emphasis added); App. A at 57-58.

> As the dissent correctly reasoned:
> It is difficult to argue that a murder is less severe because of either pre-crime or post-crime circumstances pertaining to the murderer. The victim is dead in either case. But under Cal. Penal Code section 190.3, the defense is allowed to present whatever constitutionally relevant evidence it wants to persuade the jury to spare the defendant's life and the jury may choose to spare the defendant's life based on any evidence it concludes "extenuates the gravity of the crime" even though it is "not a legal excuse for the crime" and even though it does not literally make the crime any less "severe." As the Supreme Court stated in *Skipper v. South Carolina*, 476 U.S. 1 (1986), "[a]lthough it is true that

> [favorable] inferences [drawn from the defendant's good behavior while in prison] would not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such inferences would be 'mitigating' in the sense that they might serve as a basis for a sentence less than death." (Citations omitted.)

Payton, 299 F.3d at 833 n.2 (dissent); App. A at 56-57.[2/]

Thus, contrary to the holding of the Ninth Circuit, there is no basis for distinguishing between pre-crime and post-crime evidence in mitigation particularly when, as here, the mitigation evidence relates to *character*.

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2. Indeed, in addition to his pre-crime mitigation evidence, it appears Boyde introduced post-crime evidence in mitigation in the form of a prize for dance choreography while in prison. *Boyde*, 494 U.S. at 382 n.5. In footnote 5, this Court indicated the "catch-all" instruction permitted consideration of evidence tending to show *good character* regardless of when it occurred:

> The testimony about dancing ability was presented as part of petitioner's overall strategy to portray himself as less culpable than other defendants due to his disadvantaged background and his character strengths in the face of those difficulties. As with other evidence of good character, therefore, the jury had the opportunity to conclude through factor (k) that petitioner's dancing ability extenuated the gravity of the crime because it showed that Boyde's criminal conduct was an aberration from otherwise good character.

Boyde, 494 U.S. at 382 n.5.

Because the plain meaning of the "catch-all" mitigation instruction permits consideration of *any* non-crime related mitigation evidence to support the defendant's claim for punishment less than death, not just pre-crime evidence in mitigation, the Ninth Circuit incorrectly limited *Boyde's* holding that California's "catch-all" mitigation instruction is constitutional.

The Ninth Circuit majority also ignored this Court's analysis in determining whether there was a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence.[3] Notwithstanding that Payton's jury received the same "catch-all" mitigation instruction and other additional instructions as the jury in *Boyde*, the Ninth Circuit found that there was an "*absence of instruction from the trial court*" and, as a result, the mistaken *argument* of the prosecutor constituted the *instructions* to Payton's jury. *Payton*, 299 F.3d at 825-26, (emphasis added); App. A at 31-33.

The Ninth Circuit expressly disavowed basing its decision to reverse Payton's penalty because of prosecutorial misstatement. *Payton*, 299 F.3d at 822-23; App. A at 23-24. The Ninth Circuit stated:

> We need not go down that road. At bottom, the constitutional violation here flows from the lack of guidance that the jury received regarding its duty to consider mitigating evidence. The prosecutor's

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3. In *Weeks v. Angelone*, 528 U.S. 225, 232-33 (2000), this Court reaffirmed *Boyde*'s standard for determining whether jury instructions comport with the requirement the jury be permitted to consider and give effect to a defendant's mitigation evidence.

> arguments cannot be isolated from the instruction itself or from the failure of the trial judge properly to instruct the jury or to correct the prosecutor's error.

Payton, 299 F.3d at 823; App. A at 24. Instead, the Ninth Circuit held: "Standing alone, the factor (k) instruction is unconstitutional as applied to post-crime evidence" and granted habeas relief on that basis. *Id.* at 824, 830; App. A at 29, 46.

The Ninth Circuit's conclusion there was an "absence of instruction" contradicts this Court's express holding in *Boyde* that California's "catch-all" mitigation instruction was constitutionally adequate to permit consideration of non-crime related evidence in mitigation. It further contradicts this Court's conclusion that the additional jury instructions to consider "all the evidence" made it "more improbable that jurors would arrive at an interpretation that precludes consideration of all *non-crime related* evidence." *Boyde*, 494 U.S. at 383-384, (emphasis added).

The Ninth Circuit also ignored this Court's conclusion in *Boyde* that a jury would not readily interpret California's "catch-all" mitigation instruction to disregard the *only* evidence presented in mitigation, particularly when there was no objection to the introduction of the evidence. Payton's counsel did not introduce any evidence during the guilt phase. During the penalty phase, he introduced without objection the testimony of eight people: Payton's mother, pastor, the director of a religious organization that administered to prisoners, a deputy sheriff, and four inmates. These people testified that after Payton's arrest he had made a sincere commitment to God, and, as a result, he had a calming effect on other prisoners. As in *Boyde*, all of Payton's penalty phase evidence was *non-crime* related evidence in mitigation. Thus, as in *Boyde*, it is unlikely that reasonable jurors would believe the court's instruction

transformed all of this favorable testimony into a "virtual charade." *Boyde*, 494 U.S. at 383-84.

The Ninth Circuit's limitation of *Boyde* to pre-crime evidence in mitigation is incompatible with the reasoning and holding of *Boyde*. The implications of the Ninth Circuit's decision extend far beyond the reversal of Payton's death penalty, which is a significant consequence in and of itself. The Ninth Circuit's decision in *Payton* jeopardizes the validity of numerous death penalty cases in California in which the defendant relied, at least in part, on post-crime mitigation evidence and the jury was instructed with this same "catch-all" mitigation instruction. See e.g., *People v. Gates*, 43 Cal.3d 1168, 1197, 1199-1200, 743 P.2d 301, 240 Cal. Rptr. 666 (1987) [good prisoner], *cert. denied*, 486 U.S. 1027 (1988); *People v. Frye*, 18 Cal. 4th 894, 937, 1020-21, 959 P.2d 183, 77 Cal. Rptr. 2d 25 (1998) [religious conversion and good prisoner], *cert. denied*, 526 U.S. 1023 (1999); *People v. Hernandez*, 47 Cal.3d 315, 355, 365-66, 763 P.2d 1289, 253 Cal. Rptr. 199 (1988) [difficulty of life in prison], *cert. denied*, 491 U.S. 910 (1989).

In addition, the Ninth Circuit's decision has potential consequences beyond California, as did *Boyde* itself, and could put into question the constitutionality of instructions involving jury consideration of mitigating evidence in capital cases in other jurisdictions. For example, in *Jurek v. Texas*, 428 U.S. 262, 276 (1976), this Court upheld Texas's death penalty statute which did not explicitly mention mitigating circumstances, but rather directed the jury to answer three questions. In *Proffitt v. Florida*, 428 U.S. 242, 249 (1976), this Court upheld Florida's death penalty statute identifying numerous particular mitigating circumstances without any specific reference to post-crime mitigation evidence. If *Payton*'s holding and reasoning were applied to these sentencing schemes, their constitutionality would be questioned.

Not only does *Payton* call into question the validity of sentencing schemes not specifically referencing post-crime mitigation evidence but it also imposes a duty on the State to provide a particular instruction directing the jury "it must take ... post-crime evidence into account." Yet, this Court has held: "the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigation evidence." *Buchanan v. Weeks*, 522 U.S. 269, 276 (1998). In *Buchanan*, this Court noted: "We have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigation evidence." *Buchanan v. Weeks*, 522 U.S. at 276. Again, *Payton*'s reasoning and holding are at odds with the discretion this Court has heretofore granted to the states in structuring the jury's consideration of mitigating evidence.

The Ninth Circuit's holding in *Payton* improperly limits this Court's decision in *Boyde* and has the potential to undermine the validity of several California death sentences as well as the sentencing schemes in other states. This Court should grant certiorari.

C. The Ninth Circuit's Holding Violates *Teague*

Not only did the Ninth Circuit incorrectly limit *Boyde* to pre-crime evidence in mitigation but, in holding California's "catch-all" mitigation instruction unconstitutional as applied to post-crime evidence in mitigation and that Payton's jury had to be instructed that "it must take his post-crime evidence into account," the Ninth Circuit creates a new rule of constitutional procedure in violation of *Teague v. Lane*, 489 U.S. 288 (1989).

With two narrow exceptions not applicable here, *Teague* prohibits federal courts conducting collateral review from announcing or applying a "new rule" for a state prisoner's benefit. *Butler v. McKellar*, 494 U.S. 407, 412 (1990).[4]

> A holding constitutes a "new rule" within the meaning of *Teague* if it "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "*dictated* by precedent existing at the time the defendant's conviction became final."

Graham v. Collins, 506 U.S. 461, 467 (1993) (emphasis in original). Stated another way, the "new rule" inquiry asks:

> whether a state court considering the prisoner's claim at the time his conviction became final would have felt ***compelled*** by existing precedent to conclude that the rule the prisoner seeks was required by the Constitution.

Wright v. West, 505 U.S. 277, 310 (1992) (Souter, J., concurring) (emphasis added).

Payton's conviction became final on February 28, 1994. At that time, a finding that California's "catch-all" mitigation (factor(k)) instruction was defective as a matter of federal

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4. The first exception to a *Teague* bar is for new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague v. Lane*, 489 U.S. at 307 (internal quotation marks omitted). The second, more limited exception is for " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

constitutional law was most definitely not "compelled" or "dictated" by existing precedent. *Boyde*, which upheld the constitutionality of the "catch-all" mitigation instruction, was decided in 1990. Thereafter, the California Supreme Court has consistently cited *Boyde* for the proposition the "catch-all" mitigation instruction is constitutional and provides for consideration of non-crime mitigation evidence. (See e.g., *People v. Gonzalez*, 51 Cal. 3d 1179, 1225, 275 Cal. Rptr. 729, 800 P.2d 1159 (1990); *People v. Jones*, 53 Cal. 3d 1115, 1146, 811 P.2d 757, 282 Cal. Rptr. 465 (1991); *People v. Clark*, 3 Cal. 4th 41, 162, 10 Cal. Rptr. 2d 554, 833 P.2d 561 (1992). Indeed, in 1998, in *Babbitt v. Calderon*, 151 F.3d 1170 (9th Cir. 1998), the Ninth Circuit similarly observed:

> Babbitt argues that this "unadorned" version of subdivision (k) was erroneous because the jury was not specifically told which factors it could consider as extenuating and was not informed of the definition of the term "extenuates." However, the Supreme Court has held that this instruction is neither erroneous nor ambiguous on its face.

Babbitt, 151 F.3d at 1178 (emphasis added).

In *People v. Payton*, the California Supreme Court specifically relied on *Boyde*'s holding in rejecting Payton's claim that there was a reasonable likelihood his jury believed they were precluded from considering his mitigation evidence. The California Supreme Court concluded that *Boyde* effectively disposed of any contention the instruction was unconstitutionally ambiguous.

> [T]he United States Supreme Court has held that the language of factor (k) satisfies the federal Eighth Amendment. (*Boyde v. California* (1990) 494 U.S. 370 . . . .)

People v. Payton, 3 Cal. 4th at 1070; App. E at 195.

> Applying *Boyde*, the California Supreme Court held: On this record, it is not reasonably likely that the jury understood the court's instructions as precluding consideration of defendant's mitigating evidence. While the court did not embellish the language of factor (k), that fact standing alone does not support a claim of error. (See *Boyde, supra*, 494 U.S. at p. 381 . . .) Moreover, while the prosecutor's interpretation of factor (k) was clearly incorrect, any force it might have had was blunted by the court's instruction to consider "all of the evidence," the prosecutor's own discussion of defendant's mitigating evidence, and defense counsel's correct statement of the law.

People v. Payton, 3 Cal.4th at 1072-73; App. E at 202-03.

In short, the California Supreme Court's decision was amply supported by then-existing precedent, i.e., this Court's decision in *Boyde*. A contrary conclusion was manifestly not "compelled" or "dictated" by existing precedent at the time Payton's conviction became final on February 28, 1994.

Rather than apply *Boyde* as understood for the last decade, the Ninth Circuit limits and distinguishes *Boyde*: "The fact that all of Payton's mitigating evidence was post-crime **distinguishes** this case from the pre-crime evidence at issue in ***Boyde*** which 'more readily fits within factor (k).'" *Payton*, 299 F.3d at 824 (emphasis added), App. at 28. The entire decision in *Payton* is premised upon purported limitations and distinguishing factors between *Boyde* and the instant case. However, these newly created limitations and distinctions were neither "compelled" nor "dictated" at the time Payton's case became final. And, unlike *Skipper v. South Carolina*, 476 U.S. 1, no evidence was excluded which went to Payton's post-crime character in this case. The purported limitations on *Boyde* and distinctions proffered by the Ninth Circuit are prohibited by *Teague*.

Also not *dictated* or *compelled* at the time Payton's conviction became final is the Ninth Circuit's rule requiring a specific instruction to the jury that "it must take ... post-crime evidence into account." *Payton*, 299 F.3d at 830; App. at 46. Not only did *Boyde* hold that California's "catch-all" mitigation instruction permitted the jury to consider such non-crime related mitigating evidence, but this Court has "never ... held that the state must affirmatively structure in a particular way the manner in which juries consider mitigation." *Buchanan v. Weeks*, 522 U.S. at 276. Rather, this Court has consistently held: "the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigation evidence." *Id.* Accordingly, the Ninth Circuit's holding imposing an affirmative duty to instruct Payton's jury to consider his post-crime mitigation evidence also constitutes a new rule in violation of *Teague*.

Not only did the Ninth Circuit violate *Teague* but it also violated its duty to address *Teague* when it is raised by the State. This Court has repeatedly held that where a State asserts *Teague*, "the court *must* apply *Teague* before considering the merits of the claim." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994); see also, *Horn v. Banks*, __ U.S. __, 122 S. Ct. 2147, 2149-50 (2002). The State timely filed a petition for rehearing raising the *Teague* bar to the Ninth Circuit's new rule, but the petition was denied without comment.

The Ninth Circuit has created a new rule, holding that California's "catch-all" mitigation instruction is unconstitutional as applied to post-crime evidence in mitigation, and affirmatively requiring juries to be instructed that post-crime mitigation evidence must be considered. That new rule is barred by *Teague*. Certiorari should be granted for this reason.

D. The Ninth Circuit Incorrectly Determined The Trigger Event For The Application Of The AEDPA

This case additionally presents the question of whether, in a capital case, the AEDPA applies to a petition for writ of habeas corpus filed after the AEDPA's operative date where a petitioner filed requests for counsel and stay of execution prior to the AEDPA's operative date. On October 1, 2002, this Court granted the State of California's petition for certiorari in *Woodford v. Garceau*, __ U.S. __, 123 S. Ct. 32 (No. 01-1862), presenting the same question. In both *Garceau* and in this case, the Ninth Circuit held the AEDPA did not apply to a petitioner's post-AEDPA petition because the petitioner had filed requests for counsel and stay of execution prior to the AEDPA's operative date. The Ninth Circuit's holding conflicts with five other circuits which have all held the AEDPA applies to a post-AEDPA petition regardless of any prior requests for counsel or stay of execution. *See Gosier v. Welborn*, 175 F.3d 504, 506 (7th Cir. 1999); *Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997); *Williams v. Coyle*, 167 F.3d 1036, 1040 (6th Cir. 1999); *Moore v. Gibson*, 195 F.3d 1152 (10th Cir. 1999); *Isaacs v. Head*, 300 F.3d 1232, 1245 (11th Cir. 2002).

Because this question presented is before the Court in *Garceau*, certiorari should be granted.

CONCLUSION

The petition for certiorari should be granted.

Dated: December 27, 2002.

Respectfully submitted,

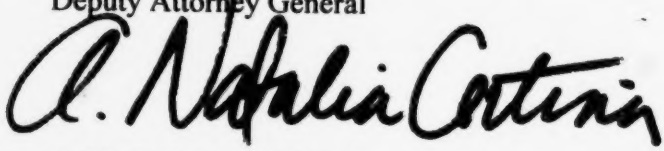
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